

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

DURHAM SCHOOL SERVICES, L.P.,)	
)	
Employer,)	
)	
And)	Case Nos. 05-CA-088893
)	05-CA-088894
)	05-CA-089702
TEAMSTERS LOCAL UNION NO. 570,)	05-CA-103688
a/w INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS,)	
)	
Petitioner)	

RESPONDENT’S REPLY BRIEF TO GENERAL COUNSEL’S ANSWERING BRIEF

NOW COMES Durham School Services, L.P., Respondent herein, and files its reply brief to the General Counsel’s answering brief as follows:

INTRODUCTION

On March 28, 2014, Administrative Law Judge Arthur Amchan issued his Decision finding that Respondent had engaged in unlawful surveillance and had created an impression of surveillance as a result of certain activities by Acting Safety Supervisor Stacey Richards on April 16, 2013. Respondent filed timely exceptions to the ALJ’s Decision and a supporting brief. The General Counsel subsequently filed an answering brief. Respondent now files its reply brief.

ARGUMENT

A. Richards Did Not Create An Impression Of Surveillance.

Although the General Counsel disputes Respondent’s contention that actual surveillance and creating an impression of surveillance are analytically distinct unfair labor practices and that the facts presented here implicate only the unfair labor practice of actual surveillance, the cases

he cite confirm, rather than undermine, Respondent's contention. (GC Brief at 11-12). Thus, the General Counsel cites *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 14 (2010) and *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1260, 1276 (2005) for the proposition that the test for the unfair labor practice of creating an impression of surveillance is whether, "under all the relevant circumstances, reasonable employees would assume from *the statement in question* that their union or other protected activities had been placed under surveillance." (Emphasis supplied) (GC Brief at 9). Similarly, *North Hills Office Services, Inc.*, 346 NLRB 1099, 1103 (2006), which the General Counsel cites for the proposition that "the gravamen of an impression of surveillance is that employees are led to believe that their union activities have been placed under surveillance *by the employer*," (emphasis supplied by General Counsel), involved *statements by supervisors* indicating knowledge of union activities based on information volunteered by other employees. The Board found no violation because the statements disclosed that the information had been provided by other employees and the employee to whom the statement was made would have no reason to believe that any surveillance by the employer had occurred. All of these impression of surveillance cases involve statements as opposed to actual observation.

Respondent does not rely merely on then-Member Oviatt's dissent in *Flexsteel Industries, Inc.*, 311 NLRB 257, 259 (1993). In that case, Member Oviatt agreed with the majority that the two unfair labor practices—surveillance and impression of surveillance—were analytically distinct and that neither was dependent upon the existence of the other. *Flexsteel* itself involved statements by supervisors suggesting knowledge of union activities. Thus, the issue concerned the creation of an impression of surveillance, not actual surveillance. Perhaps there is a case out there where an impression of surveillance was created by something other than an employer's

statement to an employee, but if so, it is the clear exception rather than the rule. Where, as is the case here, the conduct being analyzed involves actual observation of employee activities and no statements are made by the employer, the issue is solely one of actual surveillance. The Judge's findings that Richards unlawfully created an impression of surveillance are clearly erroneous and should be rejected.

B. Richards Did Not "Approach" The Union Table While Employees Were Present.

Contrary to the General Counsel's contention, Respondent does not contest the Judge's credibility resolutions. (GC Brief at 1, 7-8). The Judge did not cite specific testimony, nor purport to credit any witness, when he found that "On several occasions that morning [Richards] walked back to the area where the union had set up its table," where she was observed by several employees, (JD 3:18-22), and that Richards made "repeated trips up the driveway" (JD 4: 45-47) and "approach[ed] the union table." (JD 5: 7-8). Respondent's contention is not that the ALJ made an incorrect credibility resolution, but that he made findings that were not supported by any evidence, that were inconsistent with his actual credibility resolutions, and that mischaracterized the actual evidence.

The General Counsel's own brief does not cite any specific testimony that would support these findings by the ALJ. Indeed, the two trips up the driveway referenced by the General Counsel in his brief refer to the events that occurred *before* the time period upon which the ALJ based his findings of unfair labor practices. The first trip that Richards made up the driveway was in response to a complaint by the property owner that cars were parked on the grass. The ALJ specifically declined to find an unfair labor practice based on this trip. (JD 4: 41-43). The second trip made by Richards involved her taking pictures of the Union representatives. Again, however, the ALJ did not find a violation based on this trip or on Richards' picture-taking

activities. Thus, he “discredit[ed] the testimony of the General Counsel witnesses who testified that they were at the table when Richards photographed the organizers” (JD 3: n. 2), and he found that Richards did not stare back at the Union table as she walked back to the gate. (JD 3: 10-16). The ALJ’s findings of violations are based on the 10-15 minute period immediately following the picture-taking activities, and with regard to this time period, the General Counsel cites no evidence to support any finding that Richards walked any distance up the driveway , much less that she “approached” the Union table. Instead, the General Counsel suggests that during this time period, Richards “stopped just past the entrance gate of the facility” where she was observed by employees at the rally. (GC Brief at 6). Standing just past the entrance gate, however, is not the equivalent of walking up the driveway toward the Union rally or approaching the Union table. The Judge’s findings to this effect represent an inaccurate gloss on the record testimony.

C. Respondent Did Not Engage In Unlawful Surveillance.

Ultimately, the General Counsel’s defense of the ALJ’s conclusions boils down to the assertion that Richards did not ordinarily carry out her duties at the gate and that it was unusual for her to station herself at the gate for any period of time. Be that as it may, the General Counsel largely ignores the body of case law cited by Respondent in its supporting brief for the following proposition:

The notion that it is unlawful for a representative of management to station himself at a point on management’s property to observe what is taking place at the plant gate is too absurd to warrant comment. If a union wishes to organize in public it cannot demand that management must hide.

Tarrant Manufacturing Co., 196 NLRB 794, 799 (1972). *Accord*, *Metal Industries, Inc.*, 251 NLRB 1523, 1526 (1980); *Larand Leisures, Inc.*, 213 NLRB 197, 205 (1974), *enfd*, 523 F.2d 814 (6th Cir. 1975).

The General Counsel feebly suggests that the Board's decisions *Wal-Mart Stores, Inc.*, 340 NLRB 1216 (2003), *enfd*, 136 Fed. Appx. 752 (6th Cir. 2005), *Metal Industries*, and *Aladdin Gaming, LLC*, 345 NLRB 585 (2005), are distinguishable, but proffers no meaningful distinctions. As was the situation in *Wal-Mart*, Richards acted in response to a complaint and did not engage in other coercive behavior. Further, Richards' "job jurisdiction" encompassed the entire leased property, which included the gate and the entrance road, as well as the property to the east of the driveway and up to the drainage ditch on the west side of the driveway. At no point did Richards encroach on the private property being used by the Union for its rally. Regarding *Metal Industries*, even assuming that Richards did not have a long standing practice of stationing herself at the gate, the Board's decision in that case was not based on such practice. Indeed, according to the Board in *Metal Industries*, managers may even "depart from their normal activities in order to observe union handbilling near the property, despite the possible tendency of such activity to suggest to employees an acute interest in the identity of those receiving literature, and without proffering any particular justification for doing so." *Metal Industries, Inc.*, 251 NLRB 1523, 1526 (1980). Finally, the Board's decision in *Aladdin Gaming* was based more on the brief duration of the encounter (10 minutes) and the absence of any coercive statements by the manager than on the fact that the manager routinely used the dining area. Richards was stationed at the gate for less than 15 minutes—a place she had every right to be—and she engaged in no interaction at all with the employees who were at the rally.

Accepting the ALJ's factual findings,¹ without the unsupported gloss, we are left with only these facts: In response to a complaint from the owner of the property leased by Respondent that cars were parked on the grass, Richards approached two employees and asked them to move their cars, which they did. No other employees were present. She then walked back to the gate where she talked to some employees who were leaving the facility and checked buses as they arrived for a period of 10 to 15 minutes. Either because the Union representatives were taking her picture or on her own initiative (the ALJ made no specific finding), she then walked outside the gate and up the driveway in the direction of the Union table, where she took two pictures of the Union representatives who were standing behind the Union table. No employees were present at the time. She walked back inside the gate, where she remained for 10 to 15 minutes. During this time period, employees were at the rally. On occasion, she stepped outside the gate, but was still a considerable distance (at least 30 feet) from the rally. She took no pictures and made no notes. After 10 to 15 minutes, she left the gate area and was not seen again, even though the rally continued for another 90 minutes to 2 hours. Under well-established Board law, these facts are patently insufficient to establish either actual surveillance or the creation of an impression of surveillance.

¹ The General Counsel's contention that Richards told Martin Fox, who spoke to her as he walked out to the rally, that Daryl Owens had told her to be there, (GC Brief at 6), is based on Fox's testimony, which the ALJ declined to credit. (JD 5: 46-50)

CONCLUSION

WHEREFORE, Respondent requests that all allegations in the Complaint and in the Consolidated Complaint be dismissed.

Dated this 5th day of June 2014.

/s/ Charles P. Roberts III

Constangy, Brooks & Smith, LLP
100 N. Cherry Street
Suite 300
Winston-Salem, NC 27101-4016
(336) 721-6852
(336) 748-9112 (F)
croberts@constangy.com

CERTIFICATE OF SERVICE

I certify that I have this day served **RESPONDENT'S REPLY BRIEF** on the following persons by electronic mail:

Pablo A. Godoy
Letitia F. Silas
NLRB – Region 5
1099 14th street, N.W., Room 6305
Washington, D.C. 20570
Pablo.godoy@nrlb.gov
Letitia.Silas@nrlb.gov

Moses Jackson, Jr.
Organizer
Teamsters Local 570
6910 Eastern Avenue
Baltimore, MD 21224
Team570@comcast.net

Dated this 5th day of June 2014.

/s/ Charles P. Roberts III